

COMPLIANCE BOARD OPINION NO. 00-15

December 27, 2000

Mr. Karl Hille
The Gazette

The Open Meetings Compliance Board has considered your complaint concerning the Board of Education of Prince George's County (hereafter "County Board") as well as a timely response filed on behalf of the County Board by Andrew W. Nussbaum, Esquire, the County Board's legal counsel. In your complaint, you alleged that discussions during several closed meetings of the County Board were conducted in violation of the Open Meetings Act. You also alleged certain procedural violations relating to general practices of the County Board.

For the reasons set forth below, the Compliance Board finds that, in two instances, the County Board improperly relied on the Act's "personnel" exception to close a discussion. In other instances, closed sessions were legally permissible. Finally, the County Board has taken steps to correct a deficiency in its procedures for closing a meeting.

I

Hiring of Teachers – April 13, 2000

Your first allegation concerned an announced closed meeting of the County Board on April 13, 2000, concerning a proposed full-day kindergarten program throughout the County. In its response, the County Board indicated that the Superintendent of Schools raised the issue of full-day kindergarten at the April 13 meeting in connection with the need to hire additional teachers for the next school year. According to the County Board, "the discussion ... was to ascertain a general sense from the Board of Education whether to proceed further with the hiring of such teachers." The County Board voted to authorize the Administration to hire kindergarten teachers. The County Board indicated that its "discussion was a legitimate subject for a closed session," relying on §10-508(a)(1) of the State Government Article.¹ We disagree.

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

Subject to the procedural requirements of the Act, §10-508(a)(1) allows a public body to meet in a closed session to discuss “(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or (ii) any other personnel matter that affects 1 or more specific individuals[.]” Like all exceptions under the Act, the personnel exception must be strictly construed in favor of open meetings. §10-508(c). The Compliance Board has made clear that the personnel exception “is applicable only for a discussion of a ‘specific’ personnel matter - that is, a matter involving identifiable individuals. If ... the issue is one affecting an entire class of employees, the exception ... may not be invoked.” Compliance Board Opinion 94-5 (July 29, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 73, 75. See also Office of the Attorney General, *Open Meetings Act Manual* 27 (4th ed. 2000) (“[The personnel exception] is inapplicable to discussions of issues affecting classes of public employees, as distinct from specific individuals.”). The County Board could not properly rely on the personnel exception as justification for a closed meeting to discuss the hiring of a class of employees, *i.e.*, kindergarten teachers, without any connection to specific identifiable individuals.²

II

Principal Selection Policy and Meeting Times – July 6, 2000

You alleged two violations in connection with a closed meeting of the County Board on July 6, 2000. The first relates to a discussion concerning the school system’s principal selection policy; the second concerns consideration of a resolution that would alter the starting time of the County Board’s meetings.

We note that the Open Meetings Act is not the only law governing meetings of the County Board. See §3-1004 of the Education Article, Annotated Code of Maryland. In the event of a conflict between the Open Meetings Act and another law governing meetings of a public body, the more stringent law applies. §10-504. However, given that our jurisdiction is limited to Open Meetings Act matters, we express no opinion about the import or effect of the Education Article provisions.

² In a recent opinion, we recognized that local boards of education have broad administrative responsibilities in carrying out State law concerning the operations of schools and that these administrative matters are frequently excluded from the Open Meetings Act as “executive functions.” Compliance Board Opinion 00-10 (October 18, 2000). However, because the County Board did not suggest that this meeting involved an executive function, we express no opinion on whether this meeting may have been considered outside the scope of the Act.

In its response, the County Board acknowledged that it discussed the process used by the school system to screen, select, and appoint principals, but suggested that this discussion constituted a personnel matter under §10-508(a)(1). For the reasons discussed above, we disagree. Consideration of a policy concerning the manner in which principals are selected is not a specific personnel matter involving an identifiable individual. *See, e.g.*, Compliance Board Opinion 94-5, at 76 (personnel matter exception does not justify closing a meeting to discuss general personnel issue such as police promotional policy).

The County Board also acknowledged that it considered, but rejected, a motion to alter the starting time of its meetings from 7:00 p.m. to 7:30 p.m. Citing Compliance Board Opinion 00-10, however, the County Board suggested that this matter was an executive function, and thus was excluded from the scope of the Act. In that opinion, we distinguished between a local board's carrying out of legislative or quasi-legislative functions and its executive functions. Subject to exceptions not pertinent here, the Act does not apply when a public body is engaged in the latter. *See* §§10-502(d) and 10-503(a)(1)(i). As we indicated:

The term “executive function” is defined in part by what it is not: a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is by definition not an executive function. If a discussion is not encompassed by any of these other functions, however, *and* involves “the administration of” existing law, it falls within the executive function exclusion. ... This second aspect of the analysis requires consideration whether the matter involves the development of new policy, or merely the application of an already established law or policy. The executive function exclusion covers only the latter.

Compliance Board Opinion 00-10 (October 18, 2000) (citations omitted). We recognized that “certain housekeeping matters – administrative matters dealing with operations of the County Board that do not constitute other functions or policy decisions” constitute executive functions. *Id.* To carry out its duties pursuant to State law, it is implicit that the County Board must have regular meetings. We agree with the County Board that consideration of a motion to modify the starting time of its meetings by a half hour constitutes an administrative matter dealing with operations of the County Board, a matter that the County Board could properly consider as an executive function rather than as a policy matter under the Act.

III

Release of Audit Report – September 2, 2000

Your next allegation involves “an unannounced closed meeting held at 8:00 a.m. Saturday, September 2, 2000 ... to discuss a strategy to release the findings associated with an audit of the board office and office of the superintendent, and expense accounts of the superintendent, senior administrators and board members.” You indicated that no notice of this meeting was provided. The County Board acknowledged that the County Board met on September 2, 2000. As explained in its response, “[t]he meeting was limited to a discussion of how, when, and in what manner the audit would be released to the public.” The County Board’s position is that this meeting involved discussion of “administrative matters encompassed by the Executive Function exclusion.”

Although the County Board did not indicate the basis for the audit, we assume that it was conducted pursuant to State or local law. The purpose of the meeting was not to discuss the substance of the audit and any recommended change in policies of the County Board; rather, it was to discuss how the results of the audit would be released. The County Board’s discussion does not fit under other functions defined in the Act nor did it constitute development of a new policy. Although certain information in the audit report may be confidential, we assume that the audit report for most part would be available for public inspection. In fact, the County Board indicated that there was not any question whether the audit results would be released. Therefore, we agree with the County Board that its discussion concerning *how* it would release the audit report constituted an executive function. Because the Open Meetings Act generally does not apply to an executive function, the procedural requirements of the Act, including public notice of a meeting, do not apply.

IV

Committee Meeting Prior to County Board Meeting – September 7, 2000

Your next allegation concerns a meeting of the County Board’s Capital Improvement Plan (“CIP”) Committee prior to the County Board’s public hearing on the plan on September 7, 2000. Apparently, several other members of the County Board entered the room while the committee meeting was in progress, resulting in the presence of a quorum of the County Board. You alleged that a violation

occurred as a result of this “accidental” quorum.³ In its response, the County Board stated that “board members entered the room in which the meeting was held, and were present during further discussions. The meeting was not a closed one, and the presence of the additional members did not convert the meeting from a Committee meeting to a meeting of the full Board.”

The Open Meetings Act applies when a public body “meets” by convening a quorum for the consideration or transaction of public business. §10-502(g). The fact that a quorum of the public body is present does not necessarily make a gathering a “meeting” subject to the Act. *See, e.g.*, Compliance Board Opinion 98-2 (April 1, 1998), *reprinted in 2 Official Opinions of the Maryland Open Compliance Board* 5, 6. Of course, the CIP Committee’s discussions involved public business of the County Board. However, based on the information before us, we have no reason to believe that County Board members who were not on the CIP Committee participated in the Committee’s discussions. Therefore, we agree with the County Board’s assessment that this meeting did not constitute a “meeting” of the County Board.

V

Miscellaneous Procedural Issues

You alleged that certain practices of the County Board do not comply with the procedural requirements of the Act.

The Act sets forth certain procedures with which a public body must comply in conducting a closed meeting under provisions of the Act. Prior to a closed meeting, the presiding officer must conduct a recorded vote on the closing of the session and make a written statement of the reason for closing the meeting, citing the relevant authority under the Act, and listing the topics to be discussed. §10-508(d). The Act also requires that a public body keep minutes of its meetings. In the event of a closed meeting, the minutes of the following open meeting must include certain information concerning the closed session. *See* §10-509(c)(2). *See also* Office of the Attorney General, *Open Meetings Act Manual* 19-20 (4th ed. 2000) (addressing the process for conducting a closed meeting and the type of documentation required).

³ In your complaint, you alleged a violation by the County Board, not the CIP Committee. Therefore, we need not consider whether the CIP Committee constitutes a “public body” for purposes of the Act.

In your complaint, you indicated that the County Board has failed to provide written statements that list the topics discussed in meetings closed under the Act. You also indicated that you have experienced difficulties in obtaining the required statements from the office of the County Board.

In its response, the County Board acknowledged it has failed to document certain topics in accordance with the Act. The County Board's legal counsel has advised us, however, that the County Board has started to use the form suggested by the Attorney General to ensure compliance with the Act when conducting a closed session. *See* Office of the Attorney General, *Open Meetings Act Manual* Appendix C (4th ed. 2000). We remind the County Board that the written statement required in connection with a closed meeting is a matter of public record. §10-508(d)(4).

You also alleged that issues raised by individual board members are inaccurately attributed to "executive functions" under "Lists of Topics Discussed." Because you did not present a specific example that you perceived as a violation of the Act and because the County Board did not respond to this portion of your complaint, we decline to address this matter.

Finally, you alleged that the County Board has engaged in a "pattern of abuse" by not providing reasonable notice of its meetings. By way of example, you cite a 5:00 p.m. meeting on September 18, 2000, "to discuss 'legal matters relative to the release' of the ... audit" discussed above. You indicate that public notice was faxed to newspapers at 1:55 p.m. on the day of the meeting. In its response, the County Board repeated its position that release of the audit was an executive function. The County Board indicated, however, had the Act applied, its notice was in compliance with standards presented in the *Open Meetings Act Manual* published by the Office of the Attorney General.

Because we agree with the County Board that discussions concerning the manner in which the County Board would release the audit report constituted an executive function, we find that no violation of the Act's notice requirement occurred at the meeting held September 18.⁴ Because no evidence of a "pattern of violations" was presented, we decline to address this allegation.

⁴ Had the Open Meetings Act applied, the notice requirements of the Act would have had to be followed. As the Attorney General has explained, "[t]he Act does not mandate any particular period of advance notice. ... The rule of thumb, given the policies of the Act, is that notice of a future meeting should be given as soon as is practicable after the body has fixed the date, time, and place of its next meeting. If events require the prompt convening of a previously unscheduled meeting, the public body would be well-advised to provide immediate oral notice to reporters who are reasonably thought to be interested, and a written notice should be posted in the customary public place as quickly as possible." Office of the Attorney General, *Open Meetings Act Manual* 18 (4th ed. 2000)(citations omitted).

VI**Conclusion**

In summary, we find that the County Board violated the Open Meetings Act when it relied on the personnel exception during meetings concerning the hiring of kindergarten teachers and the school system's principal selection policy. Meetings concerning the manner in which the County Board would release an audit report involved an executive function; therefore, the Act did not apply. A meeting of the County Board's CIP Committee did not become a meeting of the County Board merely because other members of the County Board, sufficient in number to constitute a quorum, entered the room. The County Board acknowledges that documentation required in connection with closed meetings has not been in compliance with the Act, but indicates that corrective action has been taken. Finally, we lack sufficient evidence to find a "pattern of abuse" in terms of the County Board providing notice of its meetings or other violations alleged in your complaint.

OPEN MEETINGS COMPLIANCE BOARD*

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* Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.